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No. 87-937

In the Supreme Court of the United States

OCTOBER TERM, 1987

ATTORNEY GENERAL OF NEW JERSEY,
PETITIONER

v.

FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA,
RESPONDENT

On Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR VACATE

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First Family demonstrated in its Motion to Dismiss or Vacate (at 7-10) that this case no longer involves a "present, live controversy of the kind that must exist if * * * [this Court is] to avoid advisory opinions on abstract questions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (*per curiam*). The only cause of action asserted by First Family in the courts of New Jersey, the mortgage foreclosure claim against Linda Durham, was terminated by the satisfaction of Ms. Durham's mortgage debt. Moreover, petitioner, who intervened on the side of Ms. Durham in the appellate proceedings below, has no

independent claim for relief against First Family. This Court's resolution of the constitutional questions presented by the petition, therefore, could not affect the rights of any party to this case. In short, this is a one-sided controversy that petitioner seeks to use as a vehicle to obtain an advisory opinion on the constitutionality of the New Jersey Reporting Act. The speculative assertions on which petitioner relies in his Brief in Opposition to persuade the Court to the contrary simply confirm that this case does not present a justiciable dispute.

I.

First Family's former parent company was acquired by First Nationwide Bank after the filing of the petition in this case. The new owners have no interest in challenging the constitutionality of the New Jersey requirement that foreign corporations that "receive payments from persons residing in this State * * * aggregating in excess of $25,000 regardless of any other connection with this State," N.J.S.A. 14A:13-15e, file an Activities Report. As petitioner concedes (Br. in Opp. 7), the new owners have brought First Family into full compliance with the Reporting Act by filing the required Report. Furthermore, the new owners of First Family intend to comply fully with the reporting requirement in the future.[1]

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[1] Contrary to petitioner's suggestion (Br. in Opp. 10), First Family's opening brief plainly stated that its new owners intend to comply with the Reporting Act in the future, and that they have no intention of resurrecting the constitutional challenge to the reporting requirement that was initiated prior to the change in ownership. See Motion at 12 ("Any resolution of those questions should await a case in which the foreign corporation (unlike First Family) is unwilling or (unable) to comply with the Reporting Act as written"); *id.* at 6 ("The new owners, having no interest in pursuing a constitutional attack on the Reporting Act, have taken steps to put an end to the unwanted controversy they had inherited").

Petitioner, however, contends (Br. in Opp. 9) that, "[n]otwithstanding First Family's present willingness to file the activities report, there is clearly no certainty that such filings will be made in the future," and therefore "the instant controversy can be repeated." Accordingly, in petitioner's view, this case is saved from mootness by the "capable of repetition, yet evading review" doctrine. This argument is doubly flawed.

First, the "capable of repetition, yet evading review" doctrine requires that there be a "reasonable expectation" that the controversy will recur, *Meyer* v. *Grant*, 56 U.S.L.W. 4516, 4517 n.2 (1988); it is plainly insufficient that a controversy "*can* be repeated" (Br. in Opp. 9; emphasis added). In this case, there is no basis—much less a reasonable basis—for suggesting that it is likely that the new owners of First Family will refuse to file an Activities Report in the future. Following First Family's acquisition by First Nationwide Bank, there is no reason to treat it any differently than any other foreign corporation that is in compliance with the Reporting Act. It is, of course, possible to speculate that *any* corporation currently in compliance with the Act might fail to file an Activities Report in the future, but that possibility plainly does not create a justiciable dispute regarding the constitutionality of the Act between the State of New Jersey and every foreign corporation subject to (and currently complying with) the Act's requirements.

Petitioner's reliance (Br. in Opp. 8) on *California Coastal Commission* v. *Granite Rock Co.*, 107 S.Ct. 1419 (1987), to support his novel "capable of repetition" argument is inexplicable. In that case, a mining company, which had a federal right to operate on certain federally-owned lands pursuant to a federally-approved five-year plan of operations, challenged a state commission's power to exercise permit authority with respect to those mining operations. Before the case reached this

Court, the mining company's five-year plan of operations expired. This Court held that the case was not moot for two reasons. First, the state commission claimed continuing authority to require reclamation in connection with the mining that had already occurred. Second, because the mining company intended to continue its mining operations in the future, it was "likely" that the state would again assert its regulatory authority over those operations. *Id.* at 1423-24. Thus, *Granite Rock* provides no support for petitioner's suggestion that a controversy is "capable of repetition" whenever its recurrence is not logically impossible.

Beyond that, petitioner has not even attempted to explain how the issues presented in the petition would "evade review" if they were to recur. As our Motion to Dismiss or Vacate demonstrated (at 9), there is no possibility that those constitutional issues will evade review. If a foreign corporation that has not filed an Activities Report initiates litigation in the New Jersey courts, the party against whom the action is brought will have a full opportunity to litigate the corporation's right to pursue the action *before* any final judgment in favor of the foreign corporation could be entered.[2] In sum, this case clearly fails to satisfy either branch of the "capable of repetition, yet evading review" doctrine.

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[2] Thus, petitioner's reliance on *Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), is completely misplaced. There, the challenged state action had a statutory life of only three years. Accordingly, the Court's conclusion that the case was not moot was a commonplace application of the established principle that the evading review requirement is satisfied when "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*). See also *National Association of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810, 820 n.14 (1983); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 434 n.5 (1980).

II.

Petitioner also contends that this case may be saved from mootness by the "voluntary cessation" doctrine. Petitioner's contention is demonstrably wrong. That doctrine applies only to cases in which a defendant against whom injunctive relief is sought contends that the case is moot because the defendant has voluntarily discontinued the challenged conduct. See *Deakins* v. *Monaghan*, 108 S.Ct. 523, 529 n.4 (1988) (doctrine applies where "a *defendant* attempts to avoid appellate review by voluntarily ceasing the challenged conduct without losing the ability to reinitiate the conduct once the mooted case is dismissed") (emphasis in original).

In this case, First Family is not a defendant, and petitioner has no claim for relief against First Family. This was a private mortgage foreclosure suit, not a government enforcement action, and petitioner intervened in this case solely to defend the constitutionality of the Reporting Act when it came under attack in the private dispute. When that dispute terminated, there no longer existed a case or controversy to support petitioner's request for a ruling sustaining the validity of the Reporting Act. Because petitioner has no independent basis for relief against First Family, this case is moot. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969) (*per curiam*). The doctrine of "voluntary cessation" is simply inapplicable.

Petitioner cryptically suggests (Br. in Opp. 8) that there is a live "case or controversy" regarding the validity of the Reporting Act because, as an intervenor-defendant below, he remains a party in this Court under Rule 10.4. However, an intervenor's status as a party under this Court's rules does not establish the justiciability of the issues that the intervenor wishes to press on this Court for decision. Where, as here, the dispute between the real parties in interest has become moot,

there is "no case for * * * [the intervenor] to join" and the "intervenor's right to continue the suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond* v. *Charles*, 476 U.S. 54, 64, 68 (1986). Petitioner has no independent basis for relief against First Family, and therefore he does not satisfy the requirements of Article III.

Petitioner also notes that Ms. Durham, on whose side petitioner intervened as a defendant, did not participate in the appellate proceedings below, and that petitioner's intervention was motivated not by a desire to benefit Ms. Durham, but to preserve the constitutionality of the Reporting Act that had come under attack in the private mortgage foreclosure dispute. These objections are completely beside the point. First Family does not dispute that petitioner had a legally cognizable interest in defending the constitutionality of the Reporting Act at a time when there was a live controversy relating to the validity of the Act and when resolution of that controversy would have affected the rights of the parties to the litigation. However, once the mortgage dispute was resolved, petitioner's unilateral interest (no matter how intense) in securing a ruling sustaining the validity of the Act is not a constitutionally adequate substitute for a concrete dispute between adverse parties.

At all events, even if the "voluntary cessation" doctrine were applicable to a situation where a party's actions were not undertaken "to escape the threat of an injunction," *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983), it would not revive a case such as this one where there is "no reasonable expectation" that the controversy will recur. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Indeed, the very case petitioner cites for the proposition that the voluntary cessation doctrine saves a case from mootness whenever a controversy "can be repeated" involved conduct that was

virtually certain to recur. In *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), an amusement center challenged the constitutionality of a municipal licensing ordinance. While the case was pending in the lower court, the city amended the ordinance to delete the challenged language. This Court held that the case was not moot, noting that the city had *expressly* stated its intention to reenact the challenged ordinance if the lower court's injunction against its enforcement were vacated. 455 U.S. at 289 & n.11. (Petitioner fails to include footnote 11 in its selective quotation (Br. in Opp. 10) from *City of Mesquite*.)

By contrast, upon learning of the controversy relating to First Family's prior failure to file an Activities Report, First Family's new owners promptly filed the Report and terminated the pending constitutional challenge to the reporting requirement by forgiving Ms. Durham's entire mortgage debt and dismissing its own appeal in this Court. Moreover, First Family has expressly represented to this Court that it will comply with the Reporting Act in the future. There is, in short, no "cognizable danger of recurrent violation" of the Reporting Act by First Family. *United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 633. See also *Iron Arrow Honor Society* v. *Heckler*, *supra*, 464 U.S. at 72 ("Because the University has announced its decision [to exclude Iron Arrow's activities from campus] to Iron Arrow, the public, and the courts, we conclude that there is 'no reasonable likelihood' that the University will later change its mind and decide to invite Iron Arrow to return"); *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974). Any contrary assertion represents naked speculation totally devoid of factual support.

Petitioner's desire to litigate the constitutionality of the Reporting Act against a foreign corporation that is willing to comply with its requirements is understandable. However, Article III requires that constitutional

questions be decided in an adversary context based on more than "speculative contingencies." *Hall* v. *Beals*, *supra*, 396 U.S. at 49.

For the reasons stated above, and in our motion, the order granting certiorari in this case should be vacated and the petition dismissed as moot, or the judgment of the Supreme Court of New Jersey should be vacated and the cause remanded for such proceedings as that court deems appropriate. Alternatively, the petition should be dismissed as improvidently granted.

Respectfully submitted.

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